No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

For the purpose of appellee's brief, the statement of the case as found in appellant's brief (pp 1, 2, 3) is here adopted. Appellee desires, however, to point out proof disclosed is proof only in part (See Tr. pp 18, 20).

ARGUMENT

For the purpose of argument, appellee adopts the order of the specifications that are assigned by the appellant (Appellant's Brief, pp 4, 5, 6, 7, 8, 9).

I.

THE SUFFICIENCY OF THE INDICTMENT

Appellant's first proposition is:

That neither count of the indictment alleges that the prescription mentioned was filled, or that Rooney obtained a drug thereon, or at all, and that the indictment did not disclose that the appellant committed the offense of depriving the Government of revenue as provided by the Harrison Narcotic Act.

Appellant is in error when he contends that there is no allegation that the prescriptions mentioned in the indictment were filled. The wording of both counts, 1 and 2, of the indictment is as follows: That the appellant "did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away, certain derivatives and salts of opium, to-wit, 4 grains of morphine sulphate, to one Pat Rooney, alias Fred Humphrey" by means of a prescription issued and dispensed to the said Pat Rooney, "and that the said Pat Rooney, alias Fred Humphrey, was not then and there a patient of the said Claude Emerson DuVall, and the said morphine sulphate was dispensed and distributed by the said Claude Emerson DuVall not in the course of his professional practice." (Tr. pp 2, 3).

The indictment does not allege specifically that

the person to whom the prescriptions were issued actually had them filled, because such an allegation is unnecessary. The allegation of a sale implies a completed act and when it is said there is a sale through a prescription it is, in effect, said that the prescription was filled.

Mitchell v. *U. S.* (CCA6) F. (2) 514.

Jin Fuey Moy v. *U. S.* 254 U. S. 189.

The cases cited in appellant's brief are not applicable to the present case. In both *Aiton* v. *U. S.* and *Strader* v. *U. S.* (Appellant's brief p. 9), the indictments charge the issuing of prescriptions with intent to sell and barter narcotic drugs. In other words, the essence of the charge was the issuing of the prescriptions. In the present case the charge is specifically that a sale was made by means of a prescription not to a patient and not in the course of his professional practice only. In the case of *Linder* v. *U. S.*, 268 U. S. 5, cited in appellant's brief (p 11), with reference to the indictment in that case, the Supreme Court said:

> "It does not question the doctor's good faith, nor the wisdom or propriety of his action according to medical standards. It does not allege that he dispensed the drugs otherwise than to a patient or for other than medical purposes".

Appellee contends that in the present case the indictment charges the completed act of a sale to the person, not a patient of the appellant, and not in the course of his professional practice only, and does question the good faith of the appellant.

Appellant contends that the indictment does not disclose that appellant committed the offense of depriving the Government of revenue, as provided by the Harrison Narcotic Act, and that the small amount of the drug prescribed, negatives the conclusion that the appellant had a purpose of evasion of the payment of the tax required by the Harrison Narcotic Act. It is not necessary, to sustain a conviction under the Harrison Act, Section 2, that there be alleged or proven the Government was defrauded of revenue.

Bush v. *U. S.* (CCA5) 16 F. (2) 709.

Barbot v. *U. S.* (CCA4) 273 Fed. 919.

The amount of the drug charged in the indictment does not permit any conclusion by the appellant relative to his guilt or innocence. An indictment for a violation of the Harrison Narcotic Act may be predicated upon a single sale.

Hosier v. *U. S.* (CCA4) 260 Fed. 155.

Also, the sufficiency of the evidence has not been questioned by appellant, and whether or not the sale charged in the present indictment was for a large amount is not debatable at this time. The entire question involved is whether or not the appellant made the sale as a physician, by the issuing of the prescriptions charged, in good faith, to a patient, in the course of his professional practice only. The jury has found that the sale was not made in good faith and not in the course of his professional practice. This question is a matter for the jury to determine.

Hoyt v. *U. S.* (CCA 2), 273 Fed. 792.

Bush v. *U. S.* (CCA 5) 16 F (2) 709.

Appellee contends that the indictment is not defective and that it charges a violation of Section 696, Title 26, U. S. C. A.

II.

THE HYPOTHETICAL QUESTION PROPOUNDED TO A GOVERNMENT WITNESS

The hypothetical question propounded to Dr. Townsend, a Government witness, did not exclude the prescribing of morphine by appellant to Rooney, who was an addict, not suffering with an incurable disease. The question propounded was predicated on the good faith of the appellant in selling to the witness Rooney the narcotics in question, and was not predicated on Exception 1 of Article 85. So far as the record discloses, the witness Rooney was not suffering from any disease other than the addiction of morphine, and the question propounded was based upon the proposition that the appellant in making the sale by a prescription endorsed upon it "Article 85, Exception 1", (Tr. p 19), thereby adopting the regulations of Article 85, Exception 1, as his purpose in giving the prescriptions. The question propounded did not rest upon the assumption as to whether or not the appellant had complied with the provisions of Article 85, Exception 1, but upon the assumed circumstances as disclosed by the evidence in the case. It was not based upon the validity of Exception 1 of Article 85, but upon the assumed facts that a known addict had received from the appellant a prescription, upon which he had written that the prescription was given under the provisions of the exception heretofore mentioned, whereas the

proof was otherwise. There was in the question no indication that the appellant had no right to administer morphine for any disease. providing he did so in the course of his professional practice. Appellant's further argument relative to the question of personal attendance, has no bearing either upon the hypothetical question or the facts in the present case. This question did not arise. The Court carefully instructed the jury on the purposes of hypothetical questions. (Tr. pp 47, 48, 49).

III.

THE VARIANCE OF PROOF BETWEEN THE INDICTMENT AND THE ALLEGATION OF SALE

Appellant contends that while the indictment charges a sale to Rooney, the proof shows that the sale was actually made to Agent Moore. This is not the case. The indictment charges the sale to Rooney in both counts, and the proof disclosed that the prescriptions, by which the sale was made, were written for and given to the witness Rooney and he later obtained possession of the drugs on these prescriptions, and after the completed act of the sale, which was completed by his receiving the narcotics from the drug store filling the prescriptions, he delivered them to Agent Moore. The act of sale was completed at the time of the delivery of the narcotics to the witness Rooney. What became of the drugs after the completion of that sale was not material for the purpose of the indictment. They are material, as a matter of proof, to show that the drugs received were narcotic drugs as charged in the indictment. If the indictment

had charged that the sale was made to Agent Moore, unquestionably appellant would be here before this Court, or would have appeared before the lower Court, contending otherwise, that the sale was actually made to the witness Rooney to whom the prescriptions were given. Appellee contends that there is no variance in respect to the allegations contained in the indictment and the proof disclosed.

IV.

ERROR OF THE COURT IN CHARGING THE JURY WITH RESPECT TO ARTICLE 85, SECTIONS 1 AND 2

Appellant contends that the Court erred in instructing the jury relative to Article 85, Sections 1 and 2, because the regulation is void and that the instruction was contradictory and conflicting.

The instruction here questioned, (Tr. pp 32, 33, 34) is not conflicting. Certain testimony relative to Article 85 and the exceptions was introduced (Tr. p 19) and the Court, after instructing the jury as to these provisions, said:

> "Neither the statute nor the regulations preclude a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." (Tr. pp 33, 34).

What the Court actually did was to set aside the provisions of Article 85 and the exceptions thereto,

and adopt the rule as given by the Supreme Court in the *Linder* case.

Linder v. U. S. 268 U. S. 5, 22.

> "Instructions must be taken as an entirety, that is, each must be considered in connection with others of the series referring to the same subject and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, no just ground of complaint exists, even though an isolated and detached clause is, in itself, inaccurate or incomplete, and although some of them taken separately may be subject to criticism. * * * " 14 R. C. L. 817 (Instructions).

We urge that the instructions read in their entirety correctly state the law applicable to this particular case.

V.

ERROR OF THE TRIAL COURT IN CHARGING ON THE OBJECT OF THE HARRISON NARCOTIC ACT

The instruction complained of is as follows:

> "The good faith of the defendant treating the witness, Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deem-

ed a menace to the nation by Congress. If a physician and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, then the moral object of the Act is entirely defeated, *notwithstanding the fact that it is primarily a revenue measure.* It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express language of the Act." (Italics ours). (Tr. pp 37, 38).

We contend it is not prejudicial. Unquestionably there is a moral aspect to every law. The Trial Court here instructed that the Harrison Narcotic Act was primarily a revenue law but, incidental to the primary purpose, there was a moral object. In the *Nigro* case, quoted in appellant's brief (p 20), the instruction, was as follows:

"The Harrison Anti-Narcotic Law, the court should explain to you, is a law enacted by the American Congress, and the purpose of that law is to collect revenue for the government as a primary proposition, and as a secondary proposition the design and object of the law is to restrict, and to prohibit in a measure, the promiscuous traffic in what is known as narcotic drugs in this country. The traffic in narcotic drugs, or habit-forming drugs, has been of such nature that Congress felt the need of a law that would not only aid in gather-

ing revenue from such traffic, but in a suppression of such traffic in so far as it was designed for the purpose solely and alone of feeding the appetite of those who were addicted to the use of such drugs."

And again the court said:

"The Congress, in enacting a law for the taxing of such drug, or the traffic therein, and in seeking to limit or restrict such traffic, has provided that no person shall deal in such drugs," etc.

In this instruction the trial Court emphasized the incidental and moral purpose of the Act to the extent of almost obscuring the primary purpose of the Act. Even then the Circuit Court, although indicating disapproval of the instruction, did not deem such an expression as reversible error.

"What effect the statement to the jury that the secondary object of the law is to restrict, and prohibit in a measure, traffic in narcotic drugs, may have had upon the jury in the particular case, we cannot tell, and in view of the whole charge of the court it is probably doubtful that it had any controlling effect, and this court would not be in the particular instance inclined to reverse, if there were no other prejudicial errors on the face of the record."

Nigro v. *U. S.* (CCA 8) 7 F (2) 553.

In the case of *Traver* v. *U. S.* cited in appellant's brief (p 20), the Trial Court instructed that the clear

purpose of the Act was to restrict the distribution and use of opium and its derivatives to medical purposes only. There the Appellate Court said:

> "It is assuredly within the discretion of a trial judge, in charging a jury, to state the purpose, as he conceives it, that Congress had in passing any given act. If an erroneous statement of such a purpose may be considered reversible error in any case, we are entirely clear that, although the Harrison Act was passed pursuant to the taxing power of Congress and is clothed in the garb of a revenue act, the learned trial judge did not misconceive or misstate the broad underlying purpose which Congress had in passing it * * * * , and therefore that no harm was done the defendant by the statement in question."

Traver v. *U. S.* (CCA 3) 260 Fed. 923.

From this decision a writ of certiorari was taken to the Supreme Court and there denied. (251 U. S. 555).

A similar instruction was upheld by the Circuit Court of Appeals of the Fourth Circuit.

Oliver v. *U. S.* 267 Fed. 544-546.

We respectively submit that this instruction, read in the light of the Trial Court's entire charge, was not improper.

CONCLUSION

Upon a valid indictment, appellant was given a fair

and impartial trial and, upon competent evidence the sufficiency of which has not been questioned, was found guilty. We submit, therefore, that the judgment should be affirmed.

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INDEX

TABLE OF CASES

STATUTES AND TEXT BOOKS CITED